

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 13, 2007 Session

KIMBERLY MORGAN SCHUERMAN v. WADE PATRICK SCHUERMAN

**Direct Appeal from the Circuit Court for Davidson County
No. 06D-2517 Carol Soloman, Judge**

No. M2007-00173-COA-R3-CV - Filed October 22, 2007

This is a divorce action. On appeal, Husband asserts the trial court erred by awarding Wife alimony where she did not request it in her complaint for divorce. Husband further asserts the trial court erred in awarding Wife the marital home and certain stock without considering the factors enumerated in Tennessee Code Annotated § 36-4-121(c). We vacate and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part;
vacated in part; and remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Charles Galloway Blackard, III and Robert Todd Jackson, Brentwood, Tennessee, for the appellant, Wade Patrick Schuerman.

Helen Sfikas Rogers and Lawrence James Kamm, Nashville, Tennessee, for the appellee, Kimberly Morgan Schuerman.

MEMORANDUM OPINION¹

This appeal follows an uncontested divorce action. Plaintiff/Appellee Kimberly Morgan Schuerman (Ms. Schuerman) and Defendant Wade Patrick Schuerman (Mr. Schuerman) were married in September 1999 and separated in June 2005. Two children were born of the marriage.

¹**RULE 10. MEMORANDUM OPINION**

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

In August 2006, Ms. Schuerman filed a complaint for divorce, asserting as grounds irreconcilable differences and inappropriate marital conduct. In her complaint, she prayed that she be granted an absolute divorce; that the court adopt her temporary parenting plan and her permanent parenting plan; that the court adopt “the Marital Dissolution Agreement of the parties as part of its Final Decree of Divorce; and/or alternatively, the [c]ourt make an equitable distribution” of the parties’ property and debts; that the parties be required to abide by the statutory injunction provided by Tennessee Code Annotated § 36-4-106(d); and for further relief including reasonable attorney’s fees and costs. Mr. Schuerman did not answer the complaint, and on October 20 Ms. Schuerman moved for a default judgment and for a final hearing on the matter on the uncontested docket. The trial court heard the motion on October 27, and determined that Ms. Schuerman was entitled to a judgment by default. However, the trial court postponed a final hearing on the uncontested docket pending completion of a parenting class by Ms. Schuerman. Ms. Schuerman completed the class in November, and the matter was set for final hearing.

Final hearing on the matter was held in December 2006. Both Mr. Schuerman and Ms. Schuerman were present at the hearing. Ms. Schuerman was represented by counsel; Mr. Schuerman was not. The trial court heard the testimony of Ms. Schuerman and two witnesses called by her. The trial court offered Mr. Schuerman the opportunity to question Ms. Schuerman; he declined. Mr. Schuerman offered no witnesses and did not seek to present evidence to the trial court. The trial court entered its final decree of divorce awarding Ms. Schuerman a divorce based on inappropriate marital conduct. The trial court adopted Ms. Schuerman’s parenting plan and set child support; divided the parties property and debt; and ordered Mr. Schuerman to pay alimony in the amount of \$1,500 per month for three years based on “Wife’s need and Husband’s ability to pay.” Mr. Schuerman filed a timely notice of appeal to this Court. We vacate and remand.

Issues Presented

Mr. Schuerman raises the following issues, as set forth in his brief, for our review:

- (1) Whether the trial court erred in awarding any type of alimony to the appellee when there was no request filed and served upon the Appellant or due process for alimony in her original complaint for divorce and there was no amended pleading thereafter placing the Appellant on notice that alimony was a potential issue.
- (2) Whether the trial court erred in failing to make an equitable division of the parties’s marital real property and Verizon Wireless stock and failing to consider the statutory relevant factors allowed in Tennessee Code Annotated § 36-4-121.

Standard of Review

Our standard of review of a trial court sitting without a jury is *de novo* upon the record. *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn.1995). We review the trial court's findings of fact with a presumption of correctness unless the evidence preponderates otherwise. Tenn.R.App.P. 13(d). Thus, we may not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. We review the trial court's conclusions on matters of law *de novo*, with no presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn.2000).

Analysis

We turn first to the trial court's award of alimony to Ms. Schuerman. Generally, whether an alimony award is appropriate depends on the facts and circumstances of each case. The need of the recipient spouse and the obligor spouse's ability to pay are the primary considerations in the determination of an award of alimony. *Burlew v. Burlew*, 40 S.W.3d 465, 472 (Tenn. 2001). In making its determination, the court must balance several statutory factors including those enumerated in section 36-5-121(i) of the Tennessee Code. The type and amount of an alimony award are largely within the discretion of the trial court. *Burlew v. Burlew*, 40 S.W.3d at 470. This Court is not inclined to alter a trial court's award of alimony absent a finding of an abuse of discretion. *Id.*

Mr. Schuerman asserts the trial court erred in awarding alimony where it was not prayed for in the complaint. He further asserts that, as a default judgment, the judgment was limited to the relief demanded in the complaint. We note, however, that the trial court's award of alimony in this case was not made pursuant to a default judgment, but following a hearing on the trial court's uncontested divorce docket in December 2006. As noted, Mr. Schuerman was present at the December hearing. In response to the trial court, at the hearing counsel for Ms. Schuerman stated that Ms. Schuerman sought alimony in the amount of \$1500 per month for three years. At the completion of Ms. Schuerman's testimony, the trial court provided Mr. Schuerman with the opportunity to question Ms. Schuerman; he declined. Although, as Mr. Schuerman asserts, the issue of alimony was not raised in the pleadings, it clearly was tried by consent. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Tenn. R. Civ. P. 15.02. Mr. Schuerman failed to object at the hearing or even to question Ms. Schuerman. Additionally, he neither requested a continuance nor filed any post-trial motions with the trial court. This argument is without merit.

In his brief to this Court, Mr. Schuerman also asserts, in the alternative, that the award of "transitional alimony" should be vacated because the trial court failed to consider the statutory factors. We note that, in its final order, the trial court found Ms. Schuerman had a need for rehabilitative alimony, but ordered Mr. Schuerman to pay transitional alimony. Although not wholly unrelated, rehabilitative alimony and transitional alimony are separate forms of alimony and serve distinct purposes. The Code provides that rehabilitative alimony is distinguishable from other forms

of alimony, including transitional alimony, and that its purpose is to assist the disadvantaged spouse in achieving,

with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tennessee Code Annotated § 36-5-121(e)(1)(2005). Transitional alimony, however may be "awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of divorce" Tennessee Code Annotated § 36-5-121(g)(1)(2005). Thus, although we agree with Ms. Schuerman's argument that the question of alimony was litigated by consent, in light of the discrepancy in the final decree, in which the court finds rehabilitative alimony is necessary but awards transitional alimony, we vacate the award of alimony and remand. On remand, the trial court is instructed to properly classify the award as rehabilitative or transitional in light of its factual findings and the statutory guidelines.

We next turn to the trial court's division of the parties' marital home and the Verizon Wireless stock. Mr. Schuerman asserts the trial court erred by awarding the real property and stock to Ms. Schuerman. He asserts, in the alternative, that the trial court erred in failing to order that the mortgage be refinanced to remove his name therefrom.

After classifying property as separate or marital, the trial court must divide the marital property equitably between the parties in consideration of the statutory provisions provided at Tennessee Code Annotated § 36-4-121. The fairness of the property division is reflected in the end results, and a property division is not rendered unfair or inequitable merely because it is not precisely equal or because each party did not receive a share of every marital asset. Trial courts are afforded great discretion when dividing marital property. *E.g., Owens v. Owens*, No. M2005-00639-COA-R3-CV, 2007 WL 957184, at *6-7 (Tenn. Ct. App. Mar. 29, 2007), *perm. app. denied* (Tenn. Sept. 17, 2007).

In this case, the Rule 7 tables of property provided in the parties' briefs illustrates that neither the parties nor the trial court assigned any value to either party's separate property or debts, or to the marital property or debts. Additionally, the MDA referenced in Ms. Schuerman's complaint is not contained in the technical record. Therefore, we cannot determine from the record before us upon what basis the trial court determined that, in light of the total division of property, it was equitable to award Ms. Schuerman the parties' marital home and the Verizon stock where no values have been assigned to the parties' assets and liabilities. Although Ms. Schuerman asserts that there is very little equity in the marital home and that the award of Verizon stock offsets the assignment of debt to her, there is simply nothing in the record to demonstrate the values upon which the trial court reached its decision. Accordingly, we must remand.

Holding

In light of the foregoing, the award of alimony and the award of the parties' marital home and Verizon Wireless stock are vacated. The judgment is affirmed in all other respects. This matter is remanded for further proceedings consistent with this opinion. Cost of this appeal are taxed to the Appellee, Kimberly Morgan Schuerman.

DAVID R. FARMER, JUDGE